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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77——

CHARLES J. ROWE, Director of the Illinois Department of Corrections, and the People of the State of Illinois,

Petitioners,

vs.

ARTHUR DECAR FERRIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM J. SCOTT,
Attorney General of Illinois,
DONALD B. MACKAY,
MELBOURNE A. NOEL, JR.,
Assistant Attorneys General,
188 West Randolph, Suite 2200,
Chicago, Illinois 60604,
Attorneys for Petitioner.

MARK L. ROTERT,
Of Counsel.

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The petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this matter on March 23, 1977, and as amended on August 25, 1977.

Opinions Below

The initial opinion by the United States District Court for the Southern District of Illinois (Northern Division), in which the original petition for habeas corpus was denied, is not reported. The District Court later entertained a petition for re-hearing but rejected the applicant's claims upon reconsideration in orders which have not been reported.

The decision of the Seventh Circuit Court of Appeals reversing the District Court's denial of relief is reported at 551 F. 2d 185. The Order of the Court of Appeals amending the Court's original grant of relief is reported in that same opinion. Both the opinion and the subsequent amendment are attached as appendices to this opinion, *infra*.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on March 23, 1977; the Order amending this judgment was entered August 25, 1977. This petition was filed within 90 days thereafter, on November 23, 1977.

Questions Presented for Review

1. Whether the opinion of the Seventh Circuit Court of Appeals sets up a separate, more stringent standard governing guilty plea proceedings in State courts than that which is applied to the federal courts.

2. Whether the opinion of the Court of Appeals has the practical effect of imposing a retroactive rule of criminal procedure upon the State of Illinois which will act to invalidate thousands of previously obtained felony convictions.

3. Whether the imposition of a mandatory parole term upon a felony offender's sentence is a "direct consequence" of the decision to plead guilty.

Statutes and Rules Involved

The Illinois Mandatory Parole Act (Ill. Rev. Stat. 1975, ch. 38, § 1005-8-1(e)) provides, in pertinent part, as follows:

> (e) Every indeterminate sentence shall include as though written therein a parole term in addition to the term of imprisonment. Subject to earlier termination under Section 3-3-8, the parole term shall be as follows:
>
> (1) for murder or a Class 1 felony, 5 years;
>
> (2) for a Class 2 felony, or a Class 3 felony, 3 years;
>
> (3) for a Class 4 felony, 2 years.

Illinois Supreme Court Rule 402 (Ill. Rev. Stat. 1975, ch. 110A, § 402(a)) provides, in pertinent part, as follows:

> **402. Supreme Court Rule 402). Pleas of Guilty**
>
> In hearings on pleas of guilty, there must be substantial compliance with the following:
>
> **(a) Admonitions to Defendant.** The court shall not accept a plea of guilty without first, by addressing the defendant in open court, informing him of and determining that he understands the following:
>
> (1) the nature of the charge;
>
> (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences;

(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made, or to plead guilty; and

(4) that if he pleads guilty there will not be a trial of any kind, so that by pleading guilty he waives the right to a trial by jury and the right to be confronted with the witnesses against him.

STATEMENT OF THE CASE

On May 2, 1974, the Respondent was charged with armed robbery by two separate indictments returned in Rock Island County, Illinois. Armed robbery is designated as a Class One felony in Illinois. (Ill. Rev. Stat. ch. 38, § 18-2(b)). On August 23, 1974, he entered pleas of guilty to both counts pursuant to an agreement reached with Rock Island County prosecutors. This agreement stated that Respondent would enter pleas to both counts and that in return the prosecutors would recommend that a sentence of from five to ten years in prison be imposed. The Respondent entered his pleas, the prosecution made the agreed-upon recommendation, and the trial court sentenced Respondent to a term of from five to ten years.

Illinois law provides that a mandatory parole term of five years shall be included into every indeterminate sentence imposed upon a defendant who has been convicted of a Class One felony. Ill. Rev. Stat., ch. 38, § 1005-8-1(e). The Respondent, a native Californian, inquired about the effect of this provision on his sentence during the August 23, 1974 proceedings, in an exchange that went as follows:

> THE COURT: What is your understanding of the minimum and maximum?
>
> DEFENDANT: I believe the minimum is four to ten in prison and I believe the maximum is 20 to 60 years in prison.
>
> THE COURT: I don't think that's quite the way the statute reads. The minimum is four years, I think you're right on that. The minimum would be four years. There isn't any maximum. It can be any number of years plus a fine of up to $10,000, and if you are released on parole I think there's an automatic three-year parole period, isn't it?
>
> STATE: I think that's correct. Class One felony, the parole would be five years.

THE COURT: Automatically, when you are released, there is a parole period of five years. Now you know the maximum and minimum and the other details of what the possible penalty is, is it still your desire to enter a plea of guilty to 74 CF 153, the armed robbery on April 27, and 74 CF 154, the armed robbery on May 1, this year?

DEFENDANT: Yes, sir. Could I ask one question? In the event that I did receive a five to ten, let's say, for instance, served a good number of years, like nine to ten years, would I still be required to do five years on parole?

THE COURT: I suppose, if you serve your ten years, I suppose that's it. Is that your understanding, Mr. Dedoncker?

STATE: Yes.

COUNSEL: I think the Court misstated. It could be up to five years.

THE COURT: The statute says five years?

STATE: That's what it says.

THE COURT: I don't think there is any discretion.

STATE: I think the record should reflect where there is two separate and distinct charges the maximum punishment could actually be more than that. The sentence could be consecutive.

THE COURT: It's my understanding they are concurrent. I am sure if you serve the full ten years that would be the end of it, it would seem to me. Is there anything further you want placed in the record?

COUNSEL: We would tender to the Court written waivers of jury and pleas of guilty in Cases 74 CF 153 and 74 CF 154 on behalf of Mr. Ferris.

THE COURT: Mr. Ferris, your attorney has handed to me two waivers of jury and pleas of guilty containing a signature of Arthur Decar Ferris. Is that your signature?

DEFENDANT: Yes, sir.

THE COURT: And you did sign both of these as your free and voluntary act?

DEFENDANT: Yes, sir.

THE COURT: And it is your desire for the Court to accept your plea of guilty and jury waiver for each of these two charges. Is that correct?

DEFENDANT: Yes, sir.

Following his conviction and sentencing, Respondent filed a prayer for post-conviction relief in the Circuit Court of Rock Island County, Illinois. This application was denied, and that denial was affirmed by the Illinois Appellate Court and the Illinois Supreme Court. Subsequently, he applied for relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of Illinois, contending, *inter alia,* that he had been misinformed about the mandatory parole act at the time he entered his guilty plea.

The District Court, Morgan, J., denied the requested relief on the mistaken belief that the mandatory parole act would not apply to Respondent's sentence. See 551 F. 2d 185, 186 (reproduced in Appendix as slip opinion.) Respondent promptly filed a petition for re-hearing, and on December 12, 1975, Judge Morgan issued a decision on reconsideration, re-affirming his denial of the habeas corpus petition, this time on the ground that since the mandatory parole term had not yet taken effect there was no showing of current prejudice.

Respondent next brought an appeal from this decision by the District Court to the Seventh Circuit Court of Appeals. On March 23, 1977, the Court of Appeals reversed the lower court, ruling that the Respondent's guilty plea was accepted in violation of the Due Process Clause's concept of fundamental fairness. On August 25, 1977, the

Court of Appeals ordered the State of Illinois to permit Respondent to plead anew, unless within 120 days the State acted to vacate the mandatory parole term of five years.

In seeking this writ of certiorari the Petitioners note that the original cause named Fred L. Finkbeiner as a Respondent. Since Mr. Finkbeiner has left the office of Warden at the Pontiac State Penitentiary, this petition is being sought by Mr. Charles J. Rowe, Acting Director of the Illinois Department of Corrections.

ARGUMENT

I.

THE COURT OF APPEALS ERRED IN APPLYING A STRICTER STANDARD TO A GUILTY PLEA ENTERED IN THE ILLINOIS COURT THAN IT APPLIES TO GUILTY PLEAS ENTERED IN THE FEDERAL DISTRICT COURTS.

The United States Court of Appeals for the Seventh Circuit has ruled that the guilty plea entered by the Respondent was invalid under the due process clause of the United States Constitution on the grounds that the trial court mistakenly advised him about the workings of the Illinois mandatory parole provision (Ill. Rev. Stat. ch. 38, § 1005-8-1(e)) as it applied to his case. In so ruling, the Seventh Circuit subjects guilty pleas entered in the State courts to a more stringent standard of constitutional review than that which it applies to guilty pleas entered in the federal courts. This duality of standards is not only unnecessary, it is contrary to the principles of comity and federalism which are essential to the maintenance of orderly relations between the state and federal governments, principles which this Court has safe-guarded in a number of recent cases. *Cf., Francis* v. *Henderson,* 425 U.S. 536 (1976); *Wainwright* v. *Sykes,* —— U.S. ——, 97 S. Ct. 2497 (1977).

Petitioner asserts that the Illinois mandatory parole act which is at the heart of this case is virtually identical in effect to the federal Drug Abuse Prevention and Control Act of 1970. 21 U.S.C. § 801 *et seq.* Section 841(b)(1)(A) of that Act provides for a mandatory parole term upon conviction of the crimes of selling, manufacturing or possessing certain controlled substances. This mandatory

parole term may extend for 3 years for a first offender, while a prior conviction on drug charges could result in a term of 6 years mandatory parole in addition to the sentence imposed. Former section 7237(d) of Title 26, U.S.C., provided that offenders be ineligible for probation or parole. Both of these provisions were the subject of an appeal before the Seventh Circuit Court of Appeals in *Bachner* v. *United States*, 517 F. 2d 589 (7th Cir. 1975).

In *Bachner*, a defendant entered two pleas of guilty to separate drug-related charges. The first charge was governed by the former federal drug abuse act, 26 U.S.C. § 7237(d), which precluded the defendant from any eligibility for parole. At the time he pleaded guilty, Bachner was not informed of this fact. The second charge was governed by the current statute, 21 U.S.C. § 841, which imposes mandatory parole, but again Bachner was not told this before entering his plea. 517 F. 2d at 593. After being sentenced, Bachner brought collateral attack pursuant to 28 U.S.C. § 2255, claiming that his pleas must be vacated as violative of due process. The Seventh Circuit Court of Appeals, however, affirmed his conviction, holding that 1) with respect to the first plea, since the trial court "expressed his *belief* that Bachner was ineligible for *probation* . . ., at worst, Bachner knew his ineligibility for *parole* was uncertain (and therefore) he was not misled" (*Bachner* v. *U.S., supra*, 517 F. 2d at 594-95 (emphasis added); and that 2) with respect to the second plea, the "failure to advise a defendant of the mandatory parole term does not inherently result in a complete miscarriage of justice, . . . (especially where) the sentence he received was substantially below the maximum he had been told he could receive." (*Bachner, supra*, 517 F. 2d at 597). The facts of this case present a remarkably similar situation,

but the opinion which this Court should now review undeniably produced a dissimilar result. *United States ex rel. Ferris* v. *Finkbeiner*, 551 F. 2d 185 (7th Cir. 1977) withdrawn and corrected Aug. 25, 1977.

The transcript of the proceedings at which Respondent entered his plea of guilty reads, in pertinent part, as follows:

> "THE COURT: (While explaining the minimum and maximum penalties for the crime charged.) The minimum would be four years. *There isn't any maximum.* It can be *any number of years* plus a fine of up to $10,000, and if you're released on parole I think there's an automatic three-year parole period, isn't it?
>
> THE STATE: I think that's correct. Class One felony, the parole would be five years.
>
> THE COURT: *Automatically, when you are released, there is a parole period of five years.* Now you know the minimum and maximum and the other details of what the possible penalty is, is it still your desire to enter a plea of guilty (to all charges)?
>
> THE DEFENDANT: Yes, sir." (Tr. at ——, emphasis added)

If this Court will view the result in *Bachner* in conjunction with the colloquy quoted above, it will become apparent that the plea entered in federal court by Bachner was judged on a standard which was more relaxed than the one applied to Ferris' plea in the Illinois state court.

In the first place, the passage quoted shows that in this case, as in *Bachner*, the court at least tentatively expressed a "belief", or at least "uncertainty", about the mandatory parole term's application to Ferris' case. Admittedly the trial court later incorrectly construed the precise manner by which the term would apply to Ferris' sentence if he served for 10 years, but the Seventh Circuit has held,

in another federal guilty-plea case, that "the fact that everyone seem(ed) to have misapprehended the possible penalties does not . . . render (the guilty plea) unintelligent or involuntary." *Schofield* v. *United States,* 441 F. 2d 1219, 1221 (7th Cir. 1971). Here, as in *Bachner,* it may be said that the trial court's remarks should have alerted the defendant to the possibility of mandatory parole. Therefore, in this case, as in *Bachner,* it would be permissible to find that the plea was knowingly and voluntarily entered. That was, in fact, the result reached in *Bachner,* and Petitioner insists that a guilty plea entered in an Illinois court must be afforded the same standard of review which the Seventh Circuit applies to guilty pleas entered in its own trial courts.

Secondly, the exchange between the trial court and the defendant also illustrates that Ferris was told that under Illinois law he could be sentenced to a maximum term of any number of years the court saw fit to impose. Thus, in this case, as in *Bachner,* the defendant will serve a sentence which is substantially shorter than the maximum term he was told he could receive (no maximum), even if he serves the maximum term actually imposed (10 years) plus the mandatory parole term (which in actuality is a rare occurrence, since most prisoners accumulate good time credits entitling them to early release for good behavior). The Seventh Circuit ruled in *Bachner* that because a defendant actually was sentenced to less than the maximum he was eligible to receive, the failure to warn him of mandatory parole was not reversible error. Yet the opposite result was obtained in this case.

The Court of Appeals attempts to distinguish *Bachner* from the instant case by noting that *Bachner* did not involve a negotiated plea, whereas in this case Ferris entered his plea pursuant to an agreement with the State

whereby the prosecutor agreed to recommend a sentence of from five to ten years. The Court expressed its belief, both here and in a companion case involving essentially the same issues of law and fact, that the presence of a plea agreement rendered imposition of mandatory parole a violation of fundamental fairness under the due process clause. *United States ex rel. Baker* v. *Finkbeiner,* 551 F. 2d 180, 183 (7th Cir. 1977); *United States ex rel. Ferris* v. *Finkbeiner,* 551 F. 2d 185, 187 (7th Cir. 1977). The Court, in both cases, reasoned that because the two defendants had bargained for specific sentences and had also received mandatory parole terms, their pleas were "unfair", requiring the State to either vacate the terms or allow each man to plead anew.

The primary authority by which the fairness of plea-bargaining is to be judged is this Court's opinion in *Santobello* v. *New York,* 404 U.S. 257 (1971). In that case, state prosecutorial authorities clearly breached an agreement they had made with a defendant by requesting the imposition of consecutive sentences, and this Court rules that "when a plea rests in any significant degree on a promise or agreement of the prosector, . . . such promise must be fulfilled." *Santobello, supra,* 404 U.S. at 262. But this case presents no such facts. To the contrary, the trial record shows that Respondent agreed to plead guilty and in return the State agreed to recommend a sentence of from five to ten years. And that is precisely what happened; the Respondent entered his plea and the State made its recommendation that a sentence of from five to ten years be imposed. In short, the State acted in good faith, but is nevertheless being penalized on collateral attack. It must be remembered that the parole term in question is mandatory, i.e., under no circumstances could a prosecutor bargain it away, even if he wanted to do so.

It applies to all those convicted of a felony, whether by verdict, by judgment or by plea. Thus, in this case, it cannot be said that the plea-bargaining procedures used to secure the Respondent's plea were "fundamentally unfair"; there were no broken promises. The State did what it promised to do, and the judge followed the recommendation given. This process is simply not sufficient to distinguish this case from *Bachner*. Similarly, the fact that Ferris' sentence was potentially longer than he had expected it to be can hardly be persuasive distinction between *Ferris* and *Bachner*, for that same possibility existed in *Bachner* but was held, in that case, not to be reversible error.

In sum, the State of Illinois has a right to rely on the validity of its guilty pleas, and if they must be subject to collateral attack, the State certainly is entitled to have its pleas judged in accordance with the same standard by which the federal courts judge their own pleas. Since that clearly was not the case in this instance, the Petitioner respectfully submits that this Court should grant this petition in the interest of setting forth a unified standard by which all such pleas involving mandatory parole, in all courts, may be judged.

II.

THE DECISIONS BELOW CONFLICT DIRECTLY WITH A 1975 RULING BY THE ILLINOIS SUPREME COURT ON A CONSTITUTIONAL POINT THAT WILL DETERMINE THE VALIDITY OF AS MANY AS 20,000 FELONY CONVICTIONS AND SENTENCES.

The case which should now be reviewed by this Court, *United States ex rel. Ferris* v. *Finkbeiner*, 551 F. 2d 185,

is closely intertwined with another opinion rendered by the Seventh Circuit Court of Appeals, *United States ex rel Baker* v. *Finkbeiner*, 551 F. 2d 180, since both cases involve very similar question of law and fact. The *Ferris* opinion itself expressly states that the result in *Baker* was controlling over the situation presented by the Respondent Ferris. 551 F. 2d at 186. By necessity, then, no discussion of the *Ferris* case can be logically complete without reference being made to the *Baker* opinion. Both of these decisions conflict with a decision of the Illinois Supreme Court on an issue that will determine the validity of perhaps 20,000 guilty pleas which may have led to imprisonment.

In *Baker*, the Seventh Circuit Court of Appeals opined that its "holding comports with *People* v. *Wills*, 61 Ill. 2d 105, 330 N.E. 2d 505 (1975), in which the Illinois Supreme Court held that trial judges must advise defendants of a mandatory parole term accompanying an offense before accepting a plea of guilty to that offense." 551 F. 2d at 184. In actuality, however, the *Baker* and *Ferris* opinions differs substantially from the *Wills* decision both in their underlying theories and in the impact they will produce on the Illinois criminal justice system. The Petitioner asserts that an evaluation of the impact these opinions will have and are having on the Illinois courts will illustrate the need for a writ of certiorari to review the decision made by the Court of Appeals.

Illinois Supreme Court Rule 402 (Ill. Rev. Stat. ch. 110A, § 402) requires that before any defendant may plead guilty to a charge he must be admonished of the constitutional rights which he waives by such plea. As the drafter's Committee Comments to Rule 402 make clear, this requirement was instituted to assure compliance with the pronouncements of *Boykin* v. *Alabama*, 395 U.S. 238

(1968). 10 Ill. 2d R. 402. The Rule served its purpose, providing clear, on-the-record evidence of the knowing and voluntary nature of thousands of pleas. But then, on January 1, 1973, the Illinois Mandatory Parole Act (Ill. Rev. Stat., ch. 38, § 1005-8-1(e)) took effect, imposing terms of parole on all persons convicted of a felony, whether they were convicted at trial or by virtue of their own plea. Soon, several Illinois courts began receiving challenges similar to that involved in this case, as the courts began to face the problem of whether the Rule 402 admonitions were sufficient to assure the knowing and voluntary nature of a guilty plea. These challenges were squarely met and answered by the Illinois Supreme Court in its opinion in *People* v. *Wills*, 61 Ill. 2d 105, 330 N.E. 2d 505 (1975).

In *Wills*, the Illinois Supreme Court reversed a lower court opinion holding the mandatory parole act unconstitutional. The Court recognized that the act may, in certain circumstances, be susceptible of unconstitutional application, but ruled that the law on its face was nevertheless valid. *People* v. *Wills*, *supra*, 320 N.E. 2d at 507-8. The Illinois court then, in a supplemental opinion, declined to rule that the absence of admonitions about mandatory parole would render a guilty plea invalid *per se*, and instead held that such case be judged on its own facts. However, to prevent further confusion among the Illinois trial courts, the Supreme Court ruled that from that date (May 19, 1975) forward, admonitions given must directly discuss mandatory parole. 330 N.E. 2d 508-09.

The *Wills* opinion, however, expressly refused to set forth a retroactive rule that all guilty pleas accepted without mandatory parole warnings would be viewed as suspect. This refusal extends from a practical application of

common sense: prior to *Wills*, no opinion of the Supreme Court of Illinois or of this Court would have given an Illinois trial judge cause to believe that he was constitutionally required to admonish defendants about mandatory parole. *Wills* was setting forth a new rule of criminal procedure which, like most such new rules, was designed to provide even greater protection for future defendants. But the *Wills* court was not inclined to offer future protection at the expense of jeopardizing thousands of otherwise valid past convictions.** Unfortunately, the Seventh Circuit Court of Appeals has not acted with similar restraint.

Many times during the evolution of modern criminal procedural rules, courts of review are called upon to set forth new standards to govern the method by which the lower courts may try cases. Certainly this Court has never hesitated to declare that, henceforth, a new formula or rule must govern the admission of confessions, (*Miranda* v. *Arizona*, 384 U.S. 436 (1966)) or the admissibility of evidence (*Mapp* v. *Ohio*, 367 U.S. 643 (1961)). However, such landmark decision often require this Court and other appellate courts to determine whether the new rule should be applied prospectively or retroactively. Therefore, over

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**The Illinois mandatory parole act took effect January 1, 1973, and the *Wills* court instituted the new requirement concerning admonitions May 19, 1975; thus, the *Wills* opinion has no effect on the great number of pleas of guilty entered during 1973, 1974, or the first 4 months of 1975. For example, Illinois Courts' Administrative Office statistics for one of these years, 1974, shows that 17,388 persons were convicted of felonies in Illinois. Of that number, over 90%, or 15,804 convictions, were obtained following a plea of guilty.

the years a formula has been devised by which this difficult question may be resolved. Three factors must be weighed: 1) the purpose of the new rule; 2) the extent of reliance upon the old rule; and 3) the effect that retroactive application would have upon the administration of justice. *Halliday* v. *United States*, 394 U.S. 831, 832 (1969).

In the *Ferris* and *Baker* cases, the Seventh Circuit Court of Appeals has fashioned a standard, apparently of constitutional stature, by which it will judge guilty pleas which is unnecessarily strict; and as a result several thousand offenders are now in a position to re-open their cases. Petitioner stresses that

> "(w)hat is at stake in this phase of the case is not the integrity of the state conviction obtained on guilty pleas, but whether, years later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another chance of choosing between admitting their guilt and putting the State to its proof." *McMann* v. *Richardson*, 397 U.S. 759, 773 (1970).

The Petitioner believes that this Court should act to review the facts of the *Ferris* case, as well as the law, so that it may see for itself that the plea entered in this case was voluntary and knowing in every normal usage of those words. Ferris pleaded guilty of his own volition, absent any coercion, force, or pressure. He knew that his decision to so plead would result in a prison term, followed by parole if he behaved according to institutional rules. The application of the mandatory parole act is designed to fulfill a legitimate public interest (See, Haddad, *Mandatory Parole, A New Concept in Illinois Law*, 63 Ill. B.J. 236 (1976)), but its application to a sentence is simply not of such controlling impact that it justifies the drastic result of *Ferris* and *Baker*. As Mr. Justice White has stated,

> "the prohibitions against involuntary or unintelligent pleas should not be relaxed, but neither should an exercise in arid logic render those constitutional guarantees counterproductive and put in jeopardy the very human values they were meant to preserve. *North Carolina* v. *Alford*, 400 U.S. 25, 34 (1970).

The State of Illinois has rigorously complied with the *Boykin* requirements by virtue of its rule 402. It has attempted, through the *Wills* opinion, to expand the protections that Rule was intended to offer. But it must now insist that the habeas corpus relief offered by the *Ferris* and *Baker* decisions amount to a retroactive application of a new rule and a new standard of voluntariness which 1) does not serve any established constitutional purpose; 2) which runs contrary to the legitimate reliance that Illinois courts placed on Rule 402's language prior to the *Wills* opinion; and 3) which could have a potentially devastating impact on the State's criminal justice system, a system which now faces the unsavory prospect of either being forced to re-try thousands of "stale" cases or being compelled to disavow the legitimate societal ends fostered by the mandatory parole statute. *See, Halliday* v. *United States, supra.* Any such ruling against the State by virtue of a collateral attack on two of her convictions presents a great problem for the concepts of comity and federalism, but to base the attack on a standard of "voluntariness" that departs from the everyday meaning of the term is simply unjust.

Certainly the Petitioner recognizes that 28 U.S.C. § 2254 mandates that the federal courts correct constitutional defects wherever they occur in a criminal proceeding, and it is not claimed that the Court of Appeals in this case has acted without authority. But the State does assert that no constitutional defects occurred in the Ferris plea

proceedings, that both the spirit and the letter of the Consitution were fully complied with, and that to vacate this conviction because of the mandatory parole act is to elevate form over substance. Thus, while the opinion in *People* v. *Wills, supra,* indicates that Illinois believes, with the Seventh Circuit Court of Appeals, in providing even greater safeguards to those who choose to admit their guilt, Illinois does not believe the result is constitutionally required or that the desirability of discussing mandatory parole with defendants before they plead warrants disturbing conviction already validly obtained. Therefore, the Petitioner requests that the writ issue in order that Illinois might be freed from the burdens imposed by the Seventh Circuit's opinions in *Baker* and *Ferris.*

III.

THE FACT THAT A MANDATORY PAROLE TERM WILL APPLY TO A SENTENCE UPON CONVICTION IS NOT A "DIRECT CONSEQUENCE" OF THE GUILTY PLEA ITSELF, AND THEREFORE FAILURE TO ADMONISH AN ACCUSED OF THE TERM DOES NOT RENDER HIS GUILTY PLEA INVALID.

In *Boykin* v. *Alabama,* 395 U.S. 328 (1968), this Court firmly established the rule that before a criminal defendant could be fairly said to have pleaded guilty to a charge, the record at trial must indicate that such defendant knowingly and voluntarily waived his rights under the Constitution.

This requirement of an on-the-record showing of waiver was designed to assure that, in the event of any subsequent collateral attack on a guilty plea, the review courts would be able to determine the validity of the plea when judged by federal standards. 395 U.S. at 243. In order to comply with this requirement, Illinois instituted Supreme Court

Rule 402 (Ill. Rev. Stat., ch. 110 A, § 402 (a)). Rule 402 dictates that the trial court, before accepting a plea of guilty, must admonish the defendant of the nature of the charge against him, the minimum and maximum penalty prescribed by law for such offense, the accused's right to plead not guilty, his right to trial by jury, and his right to confront the witnesses against him. For example, the record in this case reveals that Ferris was advised in open court that his decision to plead guilty constituted a waiver of his rights under the Constitution, and it further shows that he nevertheless persisted in entering that plea.

The opinion of the Seventh Circuit Court of Appeals, however, has engrafted a new requirement onto the rule set forth in *Boykin,* one which finds no precedential support in any opinion of this Court: the State of Illiois will now be required to additionally admonish defendants of the workings of the Illinois Mandatory Parole Act (Ill. Rev. Stat., ch. 38, § 1005-8-1 (e)) before it can be assured that these pleas will be insulated from future collateral attack in the federal courts. Such an extension of the *Boykin* rule is both unprecedented and unwarranted.

The federal courts have long recognized that it is not possible to admonish a criminal defendant of each and every consequence which may result from the decision to plead guilty. Therefore, the courts have striven to assure that, at the least, a defendant be aware of those "direct consequences" (in the language of the former Rule 11, F.R. Crim. P.) which are of the most immediate concern tc the criminal procedural process. And, as *Boykin* illustrates, these direct consequences are most usually concerned with those fundamental constitutional rights listed in Illinois Supreme Court Rule 402. But these courts have also recognized that there is no need to admonish the defendant of the collateral consequences of a guilty plea. Fur-

thermore, it has been held this rationale concerning collateral consequences may include a greatly increased prison sentence, *United States ex rel. Montgomery* v. *Illinois*, 473 F. 2d 1382 (7th Cir. 1973) (failure to warn of possibility that 99 year sentences may be imposed consecutively held harmless, since mode of sentencing not "direct consequence" of plea), or that it may obviate the need for admonitions about consequences which result in the loss of "all that makes life worth living", *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922) (no error in failure to warn defendant that guilty plea could also result in deportation). *See also, Kemp* v. *Snow*, 464 F. 2d 579, 580-81 (10th Cir. 1972).

In this case, the defendant was represented by counsel and was thoroughly instructed about the rights which would be foregone by entry of the plea, pursuant to the commands of *Boykin* and Illinois Supreme Court Rule 402. He was specifically warned of the statutory penalty he faced as a result of his acknowledgement of guilt. The petitioner is, of course, mindful of the fact that Ferris' waiver will be viewed by this Court with the "utmost solicitude", *Boykin, supra*, 395 U.S. at 243, but even the most stringent test will, it is asserted, show that Ferris entered a knowing and voluntary plea in the sense that he knew exactly what rights were being waived. The Constitution certainly requires as much, but just as certainly the Constitution does not require that each defendant be apprised of every conceivable occurrence which may result from that plea.

Therefore, in view of the fact that the parole term imposed upon Respondent was not a direct consequence of his decision to plead guilty, within the meaning of the due process clause, the fact that the trial court did not apprise him of the term was not sufficient to render his guilty plea invalid, and the decision of the Seventh Circuit Court of Appeals should now be reviewed by this Court in order to correct this error.

CONCLUSION

For all of the reasons set forth above, the Petitioners respectfully request that a writ of certiorari be issued to review the opinion of the Seventh Circuit Court of Appeals.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of Illinois,

DONALD B. MACKAY,
MELBOURNE A. NOEL, JR.,
Assistant Attorneys General,
188 West Randolph, Suite 2200,
Chicago, Illinois 60604,

Attorneys for Petitioner.

MARK L. ROTERT,
Of Counsel.

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

August 25, 1977

Before
Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. LUTHER M. SWYGERT, Circuit Judge

No. 76-1078

UNITED STATES OF AMERICA ex rel. ARTHUR DECAR FERRIS, *Petitioner-Appellant,* vs. FRED L. FINKBINER, Warden, Pontiac Correctional Center, etc., et al., *Respondents-Appellees.*	Appeal from the United States District Court for the Southern District of Illinois, Peoria Division. No. P-MISC.-75-13 Hon. Robert D. Morgan

Pursuant to this court's order of June 10, 1977, respective counsel for petitioner-appellant and for respondents-appellees have filed statements of position regarding the proper method to implement the judgment of the court entered in this case on March 23, 1977. Leave is now granted *sua sponte* for the filing of petitioner-appellant's reply to appellees' statement and for the filing of appellees' subsequent response to appellant's reply. Arthur Decar Ferris has also submitted a pro se "PETITION FOR A WRIT OF HABEAS CORPUS," filed on June 27, 1977. Upon consideration of all the foregoing,

IT IS ORDERED that the mandate heretofore issued on April 14, 1977 be, and the same is hereby, RECALLED.

IT IS FURTHER ORDERED that the last two paragraphs of the court's corrected opinion issued March 23, 1977, are amended to read as follows:

> Since Ferris has substantially begun performing his side of the bargain, fundamental fairness can be had by limiting his term of custody to that portion of the sentence which comports with the bargain made.
> The judgment of the district court is reversed and the cause remanded with instructions to grant the petition for writ of habeas corpus to permit Ferris to plead anew, unless, within 120 days, the State of Illinois takes action to vacate that portion of the sentence which imposed the mandatory parole term of five years.

The clerk is directed to enter a new judgment consistent with the court's opinion as amended.

IT IS ALSO FURTHER ORDERED that the relief requested by Ferris in his pro se petition is in all other respects DENIED. The mandate shall reissue forthwith.

APPENDIX B

CORRECTED
IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 76-1078
UNITED STATES OF AMERICA ex rel. ARTHUR DECAR FERRIS,
Petitioner-Appellant,
v.
FRED L. FINKBEINER and STATE OF ILLINOIS,
Respondents-Appellees.

Appeal from the United States District Court for the Southern District of Illinois, Northern Division.
No. P-Misc. 75-13—ROBERT D. MORGAN, *Judge.*

Argued December 2, 1976—Decided March 23, 1977

Before FAIRCHILD, *Chief Judge,* HASTINGS, *Senior Circuit Judge,** and SWYGERT, *Circuit Judge.*

PER CURIAM. In May 1974 appellant Arthur Decar Ferris pled guilty to two counts of armed robbery in Illinois Circuit Court. The Illinois State's Attorney had made a plea agreement for a sentence of from five to ten years. The state court followed this recommendation and petitioner was sentenced to five to ten years imprisonment. Illinois law, Ill. Rev. Stat. Ch. 38, § 1005-8-3, requires a mandatory parole term of five years at the end of appellant's term of imprisonment.

---

*The Honorable John S. Hastings heard oral argument and participated in the conference of the court, but died before this opinion was submitted to him for approval.

Appellant, being from California and unfamiliar with Illinois law and procedures, requested advice from the court immediately before entering his plea, concerning a mandatory parole term. In response to appellant's inquiry as to whether he would still be required to "do five years on parole" if he served most of his sentence, the court replied, "I suppose if you serve your ten years, I suppose that's it." After some dissecussion of consecutive and concurrent sentenaces, the court concluded, "I am sure if you serve the full ten years that would be the end of it, it would seem to me." Appellant then pled guilty.

Appellant sought postconviction relief in Illinois state courts on the ground that the judge had misinformed him regarding the mandatory parole term. When relief was denied, he brought this habeas corpus petition in the district court for the Southern District of Illinois. Appellant alleges that he would not have pled guilty had he correctly understood the requirement of the mandatory parole term.

The district judge at first dismissed the petition stating:

> Petitioner is apparently under the belief that the conditions of parole apply even after service of the ten-year maximum sentence. He is mistaken in this regard on the Illinois law. See Ill. Rev. Stat. ch. 38, 1003-3-9. This part of the petition must be dismissed because it is mistaken and thus frivolous.

On a motion to reconsider, the district judge denied the relief and concluded that appellant's constitutional rights had not been violated, although he observed:

> The State's Attorney of Rock Island County and the trial court were apparently as unfamiliar with its provisions in 1974 as this court was when the original order was issued herein. Prisoners in Illinois are subject to an automatic parole term following their release, regardless of whether they have served the maximum term.

The position of the court was that the ten year plea agreement will not have been breached until the actual total exceeds ten years:

> Only when his incarceration and parole term actually do exceed 10 years may it be said that the promise has been broken.

Thus, the court concluded that there was no showing of a present injury.

This court's recent decision in *United States ex rel. Baker* v. *Finkbeiner*, No. 76-1918 (7th Cir., March 17, 1977), controls the result in this case. In *Baker* the habeas corpus petitioner received concurrent one or two year and one year sentences in Illinois state court pursuant to plea agreement. He was never told of a mandatory two year parole term required by Illinois law under the same section involved in the instant case. Because the petitioner had not been informed of the parole term at the time that he entered the guilty plea, the resulting sentence was not that for which he had agreed to plead guilty. We held that he had in fact been substantially prejudiced by the additional parole term, and that due process notions of fundamental fairness required that he receive the benefit of the bargain he had struck.

In the instant case the circumstances are similar, perhaps even more compelling. Appellant has also not received the benefit of the plea agreement made. He was not merely uninformed of the mandatory parole, but was affirmatively misinformed by the state court when he sought an explanation. Even the district judge displayed confusion as to the application of the Illinois provision. Because, as a result, he did not receive what he had agreed to in exchange for his guilty plea, appellant was substantially prejudiced by the five year term and his due process rights were violated.

Appellees argue that it is too early to find prejudice before appellant has served the full ten year term. The mere fact that appellant faces an additional five year parole term with its attendant restrictions, which he did not agree to, is sufficient prejudice. This court's decision in *Bachner* v. *United States*, 517 F. 2d 589 (7th Cir. 1975), is not relevant to this case, since it did not involve a plea agreement and, moreover, it applies only as *Baker* points out, when the actual consequences of the plea are not more dire than the defendant has been told they would be.

Since Ferris has substantially begun performing his side of the bargain, it would not be fair to vacate the plea and require him to go through the procedure anew. Fundamental fairness can be had by limiting his term of custody to that portion of the sentence which comports with the bargain made.

The judgment of the district court is REVERSED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

Supreme Court, U. S.
FILED
MAR 13 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-743

CHARLES J. ROWE, Director of the Illinois Department of Corrections, and the PEOPLE OF THE STATE OF ILLINOIS,

Petitioners,

vs.

ARTHUR DECAR FERRIS,

Respondent.

REPLY MEMORANDUM

WILLIAM J. SCOTT,
Attorney General, State of Illinois,
DONALD B. MACKAY,
MELBOURNE A. NOEL, JR.,
Assistant Attorneys General,
188 West Randolph Street (Suite 2200),
Chicago, Illinois 60601,
(312) 793-2570,
Attorneys for Petitioners.

MARK L. ROTERT,
Assistant Attorney General,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

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CHARLES J. ROWE, Director of the Illinois Department of Corrections, and the PEOPLE OF THE STATE OF ILLINOIS,

Petitioners,

VS.

ARTHUR DECAR FERRIS,

Respondent.

REPLY MEMORANDUM

RECENT OPINIONS RENDERED BY THE STATE AND FEDERAL COURTS SITTING IN ILLINOIS ILLUSTRATE WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

On November 23, 1977, the Petitioner in this cause requested that this Court issue a writ of certiorari to review the judgment rendered by the United States Court of Appeals for the Seventh Circuit in the case of *United States ex rel. Ferris* v. *Finkbeiner,* 551 F. 2d 185 (7th Cir. 1977). That petition sets forth three distinct reasons why the *Ferris* opinion merits further appellate review: firstly, because the *Ferris* decision works to impose more stringent standards of voluntariness on guilty pleas received in Illinois courts than those which are applied to guilty pleas accepted under similar circumstances in the federal district courts; secondly, that the *Ferris* decision stands in conflict with a decision rendered by the Illinois Supreme Court on the same substantive issue, thereby imposing a new, retroactive rule of criminal procedure on the Illinois courts which is not constitutionally mandated; and finally, that failure to admonish the Respondent *Ferris* about the Illinois mandatory parole provisions did not render his guilty plea invalid. See, Petition for Certiorari, No. 77-743, pp. 9-22.

In his memorandum in opposition to the petition for certiorari, the Respondent seeks to refute all three of these contentions by asserting, *inter alia,* that "it appears from the dictum in (*People* v. *Wills,* 61 Ill. 2d 105, 330 N.E. 2d 505 (1975)) that the Seventh Circuit's decision below is in complete agreement with the Illinois Supreme Court." (Memorandum in Opposition to a Petition for Writ of Certiorari, No. 77-743, p. 5).

Naturally, the Petitioners continue to adhere to their belief that the *Wills* and *Ferris* opinions are at odds in their treatment of the constitutional issues raised by Mr. Ferris' case. However, the more crucial factor which must be considered in this regard is not how the parties themselves construe these two opinions, but rather, how these opinions are being treated by the state and federal courts sitting in the State of Illinois. As such, the Petitioners ask that this Court take notice of three recent cases which deal with the constitutional issues raised by the *Wills* and *Ferris* opinions.

The first of these cases comes from the Illinois Appellate Court for the Fifth Judicial District, and is entitled *People* v. *Tidwell.* (Pursuant to Supreme Court Rule 23, Ill. Rev. Stat., 1975, Ch. 110A, § 23, the *Tidwell* opinion is not officially reported in either the Illinois Reports or the North Eastern Reporter. A copy of that decision has therefore been included, *infra,* as Appendix A.) In *Tidwell,* a unanimous panel of the Illinois Appellate Court expressly stated that "*Ferris* is potentially an exception to the *Wills* holding rather than an interpretation of it." Similarly, the Appellate Court declined to equate *Wills* with the companion case to *Ferris, United States ex rel. Baker* v. *Finkbeiner,* 551 F. 2d 180 (7th Cir. 1977), by stating. "[w]e consider *Baker* a departure from *Wills* and decline to follow it." (Appendix A, *infra.*) Thus, regardless of what interpretation the parties here may have given to these cases, it is apparent that the Illinois courts consider *Wills* to be at odds with the decisions rendered in the *Ferris* and *Baker* cases.

In another case, this one arising in the federal district court for the northern district of Illinois, the court has held that the rule set forth in *Ferris* is to be given com-

pletely retroactive effect, thereby casting doubt on the continuing validity of nearly every guilty plea accepted in the State of Illinois between January 1, 1973 and May 19, 1975 (the date of the Illinois Supreme Court's *Wills* opinion). *United States ex rel. Williams* v. *Morris*, __ F. Supp. __, No. 77 C 2402 (N.D. Ill. Jan. 27, 1978; Marshall, J.). It thus appears that the *Ferris* opinion has in fact fashioned a new, retroactive rule of criminal procedure in Illinois which directly conflicts with the Illinois Supreme Court's opinion in the *Wills* case.

Finally, it appears that the Petitioners' fears that the *Baker* and *Ferris* cases will engender a flood of federal habeas corpus petitions based on those opinions are well-founded. Indeed, one district court in Illinois has already entertained a motion seeking to certify class-action relief in a habeas corpus action by which all prisoners who entered guilty pleas in Illinois courts between January 1, 1973, and May 19, 1975, and who were not admonished as to the mandatory parole provision, would be represented. *United States ex rel. Williams* v. *Illinois*, No. 77 C 1937 (N.D. Ill.; Marshall, J.). Although this motion was later withdrawn on a suggestion of mootness in that particular case, there are indications that such class-action relief will be sought in a similar case within the near future. Moreover, even as the petition in this case remains before this Court for consideration, no fewer than eight writs of habeas corpus have already been issued on the basis of *Ferris* and *Baker*, while well over a dozen such cases await disposition. Clearly, the State of Illinois now faces the prospect of having thousands of prisoners simultaneously launching collateral attacks on convictions which the State considers wholly valid. Whether these cases arise individually or as part of a class-action petition, they pose a serious problem

for the administration of the criminal justice system in Illinois. It is for that reason that the petitioners again pray that this Court grant a writ of certiorari in order that the *Ferris* opinion be given thorough review.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General, State of Illinois,
DONALD B. MACKAY,
MELBOURNE A. NOEL, JR.,
Assistant Attorneys General,
188 West Randolph Street (Suite 2200),
Chicago, Illinois 60601,
(312) 793-2570,
Attorneys for Petitioners.

MARK L. ROTERT,
Assistant Attorney General,
Of Counsel.

APPENDIX A

No. 76-410

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

Filed December 30, 1977

PEOPLE OF THE STATE OF ILLINOIS, *Respondent-Appellee,* v. ROBERT TIDWELL, *Petitioner-Appellant.*	Appeal from the Circuit Court of Madison County. Honorable Moses W. Harrison II, Judge Presiding.

KARNS, J.

ORDER

A post-conviction hearing was held in the Circuit Court of Madison County to examine the 1975 proceedings in which Robert Tidwell pleaded guilty to armed robbery and received a sentence of four to six years imprisonment. Defendant contends that his plea was involuntary because of the absence of effective assistance of counsel and that the court's failure to admonish him of the mandatory parole term denied him due process of law. The denial of relief following an evidentiary hearing is appealed here.

On February 27, 1975, defendant was indicted for the armed robbery of the Parkside Food Shop in Granite City. A week later at his arraignment, Tidwell pleaded not guilty and Richard Allen, a public defender, was appointed to represent him.

When called for trial on April 23, Tidwel appeared with Allen who withdrew; and Terryl Francis, who had been retained by Tidwell's mother, was allowed to enter his appearance as counsel. Francis said he could be ready by May 5, so trial was set for that day. On May 5, Francis requested a continuance, citing eye problems which he said had prevented him from preparing the case. The court granted the continuance in fairness to Tidwell but found Francis in contempt of court and fined him $500. In his order the trial court noted that according to Francis his eye problems existed when he accepted the case; the court stated his belief that Francis did not prepare because he believed he could dispose of the case without trial.

On May 12, 1975, Tidwell, still represented by Francis, changed his plea to guilty in return for the above-named sentence and dismisal of two other charges. Before accepting Tidwell's guilty plea, Judge Mosele gave Tidwell all of the admonitions prescribed by Rule 402 (Ill. Rev. Stat. 1974, ch. 110A, par. 402) except that he failed to admonish Tidwell that the sentence carried a mandatory five year parole term as required by section 5-8-1(e)(1) of the Unified Code of Corrections (Ill. Rev. Stat. 1975, ch. 38, par. 1005-8-1(e)(1)).

Tidwell maintains that the absence of an admonition regarding the mandatory parole term renders his guilty plea involuntary and therefore taken in violation of due process of law. This issue was decided by the Supreme Court in *People* v. *Wills*, 61 Ill. 2d 105, 330 N.E. 2d 505, cert. den., __ U.S. __, 96 S. Ct. 430 (1975). It was held in *Wills* that compliance with Rule 402(a)(2) requires that a defendant be admonished that a mandatory period of parole is part of his sentence. The court explicitly held, however, in its supplemental opinion that this requirement would apply only to those guilty pleas taken subsequent to May 19,

1975. (61 Ill. 2d at 111, 330 N.E. 2d at 509.) As Tidwell pleaded guilty before that date, his case is not includible within the prospective application of the *Wills* ruling. (*People* v. *Irons*, (Docket No. 76-545, 5th Dist., filed Oct. 21, 1977), __, Ill. App. 3d __, __ N.E. 2d __; *People* v. *Miller*, 36 Ill. App. 3d 943, 344 N.E. 2d 760 (1st Dist. 1976); *People* v. *Bosse*, 32 Ill. App. 3d 442, 336 N.E. 2d 216 (5th Dist. 1975); *People* v. *Whitehead*, 32 Ill. App. 3d 615, 336 N.E. 2d 59 (5th Dist. 1975).)

Defendant urges this court to follow two recent decisions of the United States Court of Appeals for the Seventh Circuit: *United States ex rel. Baker* v. *Finkbeiner*, 551 F. 2d 180 (7th Cir. 1977) and *United States ex rel. Ferris* v. *Finkbeiner*, 551 F. 2d 185 (7th Cir. 1977). *Ferris* is potentially an exception to the *Wills* holding rather than an interpretation of it. Immediately before pleading guilty, Ferris asked the court if he would have a parole term and was told that he would not. That the court inadvertently misled him is quite different from a mere failure to admonish. We consider *Baker* a departure from *Wills* and decline to follow it.

Secondly, Tidwell asserts that his guilty plea was involuntary and resulted from ineffective assistance of counsel. He contends that neither the public defender nor his retained counsel thoroughly investigated his case and prepared for trial. He also alleges that after being discharged, Francis told him to plead guilty or get another lawyer. As Tidwell believed the court would not allow him to dismiss Francis and again receive the assistance of the public defender, he decided to plead guilty rather than risk receiving a severe sentence if convicted after a trial with an unprepared defense attorney.

The general rule governing alleged incompetence of retained counsel is well settled. In order for a petitioner to

prevail at the post-conviction hearing, he must clearly establish "(1) actual incompetency of counsel, as reflected by the manner of carrying out his duties as trial attorney; and (2) substantial prejudice resulting therefrom without which the outcome would probably have been different." (*People* v. *Morris*, 3 Ill. 2d 437, 449, 121 N.E. 2d 810, 817 (1954); *People* v. *Ferrance*, 32 Ill. App. 3d 358, 361, 336 N.E. 2d 532, 534 (1st Dist. 1975); *People* v. *Mason*, 29 Ill. App. 3d 121, 126-27, 329 N.E. 2d 794, 797 (5th Dist. 1975)). Our standard for review is that the factual determinations of the post-conviction hearing judge will not be disturbed unless manifestly erroneous. (*People* v. *Bratu*, 46 Ill. 2d 143, 146, 262 N.E. 2d 921, 923 (1970); *People* v. *Wease*, 44 Ill. 2d 453, 457, 255 N.E. 2d 426, 428 (1970).)

At the post-conviction hearing, Tidwell testified that he had seen public defender Allen once, on the day Tidwell discharged him, and Francis only a few times. Thus, Tidwell concludes that neither attorney was prepared to try his case. Time spent on a case, however, does not of itself establish the quality of the work, or provide per se a standard of competence of counsel. (*People* v. *Mason*, 29 Ill. App. 3d 121, 127, 329 N.E. 2d 794, 797-98 (5th Dist. 1975).) More particularly, Tidwell alleges that neither attorney investigated or interviewed witnesses. Aside from the presumption that both attorneys had the report of the public defender's investigator, whom Tidwell admits visited him in jail three or four times, both had copies of the police reports. Further, in neither the petition for post-conviction relief nor in his testimony did Tidwell offer any suggestion as to how further investigation could have aided his case. No person who could have been a witness for the defendant at trial was identified. (*See People* v. *Dudley*, 46 Ill. 2d 305, 307-08, 263 N.E. 2d 1, 3-4 (1970) *cert den.* 402 U.S. 910 (1971); *People* v. *Ferrance*, 32 Ill. App. 3d 358,

362, 336 N.E. 2d 532, 535 (1st Dist. 1975); *People* v. *Mason*, 29 Ill. App. 3d 121, 127, 329 N.E. 2d 794, 798 (5th Dist. 1975).)

The heart of Tidwell's contention is that he feared the quality of representation he would receive at trial so, rather than risk a conviction and severe sentence, he made an involuntary plea of guilty. We find Tidwell's position to be without merit. Advising a defendant to plead guilty after appraising the likelihood of success at trial is a tactical decision which an attorney must sometimes make. (*People* v. *Ferrance*, 32 Ill. App. 3d 358, 361, 336 N.E. 2d 532, 535 (1st Dist. 1975).) Contrary to Tidwell's apparent belief, a defense attorney would have been remis had he failed to advise a defendant of the probable outcome of his trial including sentencing. (*People* v. *Bratu*, 46 Ill. 2d 143, 146, 262 N.E. 2d 921, 923 (1970).) An allegation that a defendant feared a severe sentence, even the death penalty, does not invalidate an otherwise voluntary plea. (*People* v. *Granberry*, 45 Ill. 2d 11, 14, 256 N.E. 2d 830, 832 (1970); *People* v. *Mason*, 29 Ill. App. 3d 121, 126, 329 N.E. 2d 794, 797 (5th Dist. 1975).)

Responding to the court's questions at his change of plea hearing, Tidwell stated that his guilty plea was voluntary, that he understood that he was entitled to a court-appointed attorney if he could show his indigency, and that no force or threats induced him to plead guilty. He did not complain of either attorney's incompetence at that time. In this respect, the instant case differs from *People* v. *Moone*, 45 Ill. 2d 488, 259 N.E. 2d 785 (1970), in which the record shows that the defendant told the court at his change of plea hearing that that he was pleading guilty because his attorney wanted to "get off the case." (45 Ill. 2d at 490, 259 N.E. 2d at 786).

For the foregoing reasons, we find that the denial of post-conviction relief should not be disturbed.

Finding that an opinion would have no precedential value, we affirm the judgment of the Circuit Court of Madison County pursuant to our power under Supreme Court Rule 23 (Ill. Rev. Stat. 1975, ch. 110A, par. 23).

AFFIRMED.

CONCUR: CARTER, JONES, JJ.